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HOME (ELECTIONS) DEPARTMENT

NOTIFICATION

The 16th February 2012

No. VE(A)-213/2009-**1407**/Elec, - The following Notifications No.82/OR-LA/(4/2009)/2010 both dated 26th December, 2011 issued by the Election Commission of India, New Delhi are hereby published for general information.

By order,

S.SRINIVASAN

Chief Electoral Officer & Ex-officio
Principal Secretary to Government

ELECTION COMMISSION OF INDIA

Nirvachan Sadan, Ashoka Road, New Delhi –110 001

Dated : 26th December, 2011

5, Pausha, 1933 (Saka)

NOTIFICATION

No.82/OR-LA/(4/2009)2010—In pursuance of Section 116C of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the Judgement of the Supreme Court of India dated 09.12.2011 in 'Ramesh Rout Vs. Rabindra Nath Rout' in Civil Appeal No.4956 of 2010 tagged with 'Ramesh Rout Vs. Ranendra Pratap Swain' in Civil Appeal No.4962 of 2010 filed by Shri Ramesh Rout challenging the Order of the High Court of Orissa: Cuttack dated 23rd June, 2010, declaring thereby the election of Shri Ramesh Rout to the Legislative Assembly of Odisha from 89-Athagarh Assembly Constituency null and void.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4956 OF 2010

Ramesh Rout

.... Appellant

Versus

Rabindra Nath Rout

.... Respondent

WITH

CIVIL APPEAL NO. 4962 OF 2010



JUDGMENT

R.M. Lodha, J.

JUDGMENT

The returned candidate — Ramesh Rout — whose election to the 14th Orissa Legislative Assembly from 89-Athagarh Assembly Constituency has been set aside by the High Court of Orissa has preferred these two appeals under Section 116A read with Section 116C of the Representation of the People Act, 1951 (for short, ‘the 1951 Act’).

2. The Election Commission of India (for short, 'Commission') in order to constitute 14th Legislative Assembly announced general elections in the State of Orissa to be held in two phases on April 16, 2009 and April 23, 2009. Following this, the Governor of the State of Orissa in exercise of powers conferred under Section 5(2) of the 1951 Act issued a notification which was published in the official gazette on March 28, 2009. The 89 – Athagarh Assembly constituency is one of the 147 Assembly constituencies in the State of Orissa and is 'General' constituency.

The Commission appointed the following schedule of election :

“28.3.2009
To
04.04.2009 = Period prescribed for filing of
“NOMINATIONS”
06.04.2009 = date fixed for SCRUTINY OF
NOMINATIONS.
08.04.2009 = last date for WITHDRAWAL OF
NOMINATIONS
23.04.2009 = date of POLLING.
16.05.2009 = date of COUNTING OF VOTES.
28.05.2009 = date before which the Election
shall be completed.”

3. On April 4, 2009, at 11.25 A.M., the respondent in Civil Appeal No. 4962 of 2010 – Ranendra Pratap Swain (hereinafter referred to as 'proposed candidate') filed four sets of nomination papers for 89-Athagarh Assembly constituency as a candidate of

Biju Janata Dal ('BJD') – a registered and recognized political party in the State of Orissa before the Returning Officer. Seven other candidates including the present appellant also filed their nomination papers at the said election. The check list (ticked original) was issued by the Returning Officer with his signature to the proposed candidate at 11.45 a.m. A copy of the check list (ticked duplicate) was retained by the Returning Officer.

4. On the appointed date (i.e. April 6, 2009) and time for scrutiny of nominations, the Returning Officer rejected the nomination papers of the proposed candidate on the ground that the Form A and Form B filed by the proposed candidate along with his first set of nomination paper were not duly signed in ink by the authorized officer of the political party (BJD).

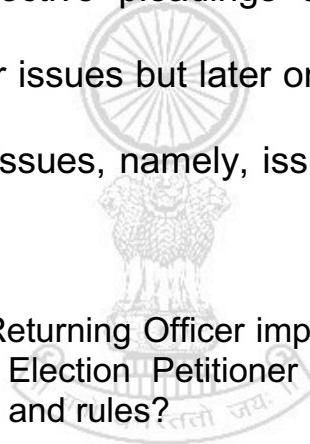
5. Upset with the order of Returning Officer dated April 6, 2009, rejecting his nomination, the proposed candidate filed a writ petition before the Orissa High Court. However, the High Court did not entertain the writ petition and directed him to pursue his grievance before the Commission or seek appropriate relief after election process was over. The proposed candidate raised his grievance before the Commission but without any success.

6. The election to the 89-Athagarh Assembly constituency was held as per election schedule and the appellant who contested the election as an independent candidate was declared elected.

7. Two election petitions came to be filed before the Orissa High Court challenging the election of the appellant to 89-Athagarh Assembly Constituency. One by the proposed candidate being Election Petition no. 4 of 2009 and the other by the proposer – respondent in Civil Appeal No. 4956 of 2010 being Election Petition no. 6 of 2009. In both election petitions, the election of the appellant was challenged on the ground of improper rejection of nomination papers of the proposed candidate. It was averred therein that the proposed candidate had filed Form A and Form B signed in ink by the authorized person along with first set of nomination paper showing that he had been duly sponsored by the BJD to contest as a party nominee from 89-Athagarh Assembly constituency and with other three sets of nomination, he had filed xerox copies of original Forms A and B duly authenticated by a Notary Public. The election petitioners raised diverse grounds in challenging the order of the Returning Officer dated April 6, 2009 whereby the nomination papers of the proposed candidate were rejected.

8. The appellant — (respondent therein) — contested the election petitions by filing separate written statement. He raised objections about the maintainability of election petitions on facts and in law. Inter alia, it was denied that the proposed candidate filed original Form-A and Form-B signed in ink by the authorized person of BJD as at the time of scrutiny original Form A and Form B were not available and the Form A and Form B on record did not contain ink signature.

9. On the respective pleadings of the parties, the High Court initially framed four issues but later on framed additional issue no. 5. The relevant two issues, namely, issue no. 3 and issue no. 5 read as follows :

The seal of the Supreme Court of India, featuring the Lion Capital of Ashoka, the motto "Satyameva Jayate", and the text "SUPREME COURT OF INDIA".

“3. Whether the Returning Officer improperly rejected the nomination of the Election Petitioner in violation of the statutory provisions and rules?

The seal of the Supreme Court of India, featuring the Lion Capital of Ashoka, the motto "Satyameva Jayate", and the text "JUDGMENT".

5. Whether the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercise of its constitutional powers and the principles of natural justice or not?”

10. The election petitioners as well as the returned candidate tendered oral and documentary evidence. On behalf of the election petitioners, three witnesses, namely, proposer – Rabindra Nath Rout

(PW-1); proposed candidate – Ranendra Pratap Swain (PW-2) and authorised agent – Tarani Kanta Biswal (PW-3) were examined. On the other hand, the returned candidate examined himself as RW-1 and one Magnicharan Rout as (RW-2). The Returning Officer was examined by the Court as its witness (CW-1). The documents tendered in evidence were marked separate exhibits.

11. The High Court also called for all the original documents pertaining to the scrutiny of nomination papers for 89-Athagarh Constituency and 87-Badamba Constituency. We shall refer to relevant documentary evidence appropriately wherever necessary.

12. The High Court on hearing the parties, at the time of decision in the election petitions, framed an additional issue no. 6 namely, whether the election petitioner (proposed candidate) filed the original Form A and Form B duly signed in ink by the authorized person with the first set of his nomination paper. The High Court answered issue nos. 3, 5 and 6 in the affirmative and allowed both election petitions on June 23, 2010 and declared the election of the appellant null and void. The High Court declared that a casual vacancy is created relating to 89-Athagarh Assembly Constituency and the Commission was directed to conduct fresh election in respect of the said constituency in accordance with law.

13. It is from this judgment that these two appeals have arisen.

14. We have heard Mr. Gopal Subramanian, learned senior counsel for the appellant and Mr. K.K. Venugopal, learned senior counsel for the proposed candidate.

15. The Returning Officer plays an important role in the election management and to ensure that there is no scope left for any complaint, the Commission has issued a handbook for Returning Officers (for short, 'the handbook') The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions; to acquaint them with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management. We shall refer to the relevant provisions of the handbook a little later. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers.

16. By virtue of a notification dated February 10, 2009 (Exhibit 10) issued by the Commission, for the first time, the issuance of check list to a candidate filing nomination paper has been introduced. Prior thereto, there was no such provision. It is provided

that in respect of each candidate, the Returning Officer should maintain, in duplicate, the check list of the documents/requirements filed by the candidates. When a candidate files nomination paper, the Returning Officer shall indicate in the second column of the check list whether the concerned documents have been filed or other requirements fulfilled. If any of the documents has not been filed, it requires the Returning Officer to clearly state in the bottom of the check list, indicating the time limit by which such document/s can be submitted. The check list in two sets with all requirements indicated is needed to be signed by the Returning Officer as well as the candidate. The check list (marked original) is handed over to the candidate/proposer who files nomination paper, while check list (marked copy) is retained by the Returning Officer. The notification states that the copy of the check list will serve the dual purpose of acknowledging the receipt of the documents submitted as well as of notices as directed in the handbook. It is further provided that no separate notice is required to be given to the candidate in respect of the items mentioned in the check list. If and when a document is filed subsequent to filing of nomination, an acknowledgment to that effect is issued to the candidates, namely, mentioning the date and time at which it is filed and this is also indicated in the appropriate place in

the check list retained by the Returning Officer. The proforma of the check list has also been notified with the notification dated February 10, 2009.

17. Section 33 of the 1951 Act makes provision for presentation of nomination paper and requirements for a valid nomination. To the extent it is relevant for the purposes of the present case, it is reproduced as follows :

“S. 33. Presentation of nomination paper and requirements for a valid nomination.—(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o' clock in the forenoon and three o' clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

xxx



xxx

xxx

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the

description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

xxx

xxx

XXX”

18. Section 35 provides for notice of nominations and the time and place for their scrutiny.

19. The provision concerning scrutiny of nomination is made in Section 36 of the 1951 Act. To the extent it is relevant, it reads as follows :

“S. 36. Scrutiny of nomination.—(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

xxx

xxx

xxx

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

xxx

xxx

xxx"

20. The Conduct of Elections Rules, 1961 (for short, '1961 Rules') have been framed under the 1951 Act. Rule 4 provides that every nomination paper presented under sub-section (1) of Section 33 shall be completed in such one of the Forms 2A to 2E as may be appropriate. Proviso that follows Rule 4 makes a provision that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B shall not be

deemed to be a defect of substantial character within the meaning of sub-section (4) of Section 36.

21. Form 2B under Rule 4 is in three parts. Part-I is to be used by a candidate set up by a recognised political party. Part-II is required to be filled by a candidate for election to the legislative assembly not set up by a recognised political party and it provides that there should be ten electors of the constituency as proposers. Part-III of Form 2B is a declaration to be made by the candidate giving assent to his nomination. Clause (b)(i) is applicable to a candidate who has been set up by a recognised political party with a request that symbol reserved for such party be allotted to him. Clause (b)(ii), on the other hand is applicable to a candidate not set up by any registered recognised political party or a candidate who is contesting the election as an independent candidate. A recognised political party means a political party recognised by the Commission under the 1968 Order.

22. Rule 5 of the 1961 Rules makes a provision for symbols for elections in parliamentary and assembly constituencies. Rule 10 of 1961 Rules provides for preparation of list of contesting candidates.

23. In exercise of the powers conferred by Article 324 of the Constitution of India read with Section 29A of the 1951 Act and Rules 5 and 10 of the 1961 Rules, the Commission made Election Symbols (Reservation and Allotment) Order, 1968 (for short '1968 Order'). Unregistered political parties are out of its purview. The registered recognized and unrecognized political parties and independent candidates are dealt with by the 1968 Order. 1968 Order came to be amended by notification no. 56/2000/Judl. III dated 1st December, 2000. Para 13 of the 1968 Order is relevant for consideration of the present matter. It reads as follows :

"13. When a candidate shall be deemed to be set up by a political party.—For the purposes of an election from any Parliamentary or Assembly Constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such Parliamentary or Assembly Constituency, if, and only if—

- (a) the candidate has made the prescribed declaration to this effect in his nomination paper,
- (aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;
- (b) a notice by the political party in writing in Form B, to that effect has, not later than 3.p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;
- (c) the said notice in Form B is signed by the President, the Secretary or any other office-bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send such notice;

- (d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the constituency and to the Chief Election Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and
- (e) Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party:

Provided that no fascimile signature or signature by means of rubber stamp, etc. of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted.”

24. Chapter VI of the handbook deals with the scrutiny of nominations by the Returning Officer. Para 2 emphasises that scrutiny of nomination papers is an important quasi-judicial function and the Returning Officer has to discharge this duty with complete judicial detachment and in accordance with the highest judicial standards. Para 6 provides that even if no objection has been raised to a nomination paper, the Returning Officer has to satisfy himself that the nomination paper is valid in law. If any objection is raised to any nomination paper, the Returning Officer has to hold a summary inquiry to decide the same and treat the nomination paper to be either valid or invalid. It states that brief reasons in support of the decision must be set out, particularly, where an objection has been raised or the nomination paper has been rejected. Para 7 provides for presumption of validity of every nomination paper unless the contrary

is prima facie obvious or has been made out. In case of a reasonable doubt, as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Para 7 seeks to remind the Returning Officer that whenever a candidate's nomination paper is improperly rejected and he is prevented from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper rejection and the election is liable to be set aside. Para 9.6 sets out some of the defects which may be treated by the Returning Officer as defects of substantial nature. It, inter alia, provides that failure to submit written authorisation form from the political party, within prescribed time and in prescribed form, where a candidate claims to have been set up by a national or state party, is a defect of substantial nature. Para 10.3 says that the nomination paper filed by a candidate claiming to have been set up by a recognised national/state party subscribed by only an elector as proposer is liable to be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency by an authorised office-bearer of that political party by 3 p.m. on the last date for making nominations in Forms A and B devised by the Commission for the purpose under para 13 of the 1968 Order.

25. In light of the above provisions, particularly Sections 33(1) and 36(1) of the 1951 Act, Rule 4 of the 1961 Rules, Part-III of Form 2B, para 13(e) of the 1968 Order and Forms A and B appended to 1968 Order and the guidelines issued to the Returning Officers in the handbook, Mr. Gopal Subramanian, learned senior counsel for the appellant submitted that where a candidate for the election to Assembly has been set up by a recognised political party, the filing of original Forms A and B duly signed in ink by an authorised person of such political party is non-negotiable and non-filing of original Forms A and B signed in ink constitutes a defect of substantial nature. Learned senior counsel argued that proviso to Rule 4 carves out an exception in respect of declaration in relation to symbol by candidates of unrecognised political party and independent candidates as per clause (b)(ii) of Part-III of Form 2-B and has no application to the case of a candidate belonging to a recognised political party who has to make a declaration as required by clause(b)(i) thereof. According to Mr. Gopal Subramanian, the proviso appended to Rule 4 and para 13 of the 1968 Order operate in completely different fields without any overlap or conflict. He vehemently contended that the present case squarely falls under Section 36(2)(b) of the 1951 Act for failure to comply with the requirement of nomination paper completed in

prescribed form. He would argue that the nomination having been subscribed by one proposer, basing on the declaration given by the election petitioner, it is intrinsic mandatory requirement of the 1968 Order that ink signed Forms A and B were filed prior to 3 P.M. on the last date of making nomination so as to sustain the declaration of the candidate having been set up by a recognised political party.

26. On the other hand, Mr. K.K. Venugopal, learned senior counsel for the proposed candidate contended that Section 36(4) of the 1951 Act read with proviso to Rule 4 of the 1961 Rules and Form 2 B (Part III) would make the filing of xerox copy of Form A and Form B permissible (assuming that xerox copy of Form A and Form B were filed only) and cannot form the basis of the rejection of the nomination paper. He submitted that failure to file original Form A and Form B signed in ink was not defect of a substantial character within the meaning of Section 36(4) of the 1951 Act. According to him, para 13(e) of the 1968 Order that states "Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party" is only an expression of hope and is not mandatory as it does not use the expression 'shall be signed'. He referred to a decision of this Court in the case of *Jagan Nath v. Jaswant Singh & Ors.*¹ in support of his submission that the election law is technical and unless

¹ 1954 SCR 892

express provision is found, one cannot read the word "are" as "shall". With reference to Section 33(1) of the 1951 Act, Mr. Venugopal would submit that the expression "a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer" did not require the nomination paper to be accompanied by specified documents. Rule 4 of the 1961 Rules deals with the nomination paper while para 13 of the 1968 Order deals with the political party's authorisation. The two are separate and distinct and para 13 of 1968 Order cannot be read into Rule 4 of the 1961 Rules.

27. Mr. K.K. Venugopal, learned senior counsel submitted that neither Section 33 nor Section 34 of the 1951 Act required that the nomination should be accompanied by the sponsorship or authorisation of a political party. Section 36(2) of the 1951 Act sets out the grounds on which nomination paper can be rejected. Neither clause (a) which deals with qualifications and disqualifications nor clause (b) that deals with failure to comply with Section 33 nor Section 34 or clause (c) which deals with signature of the candidate or his proposer is relevant to the present controversy.

28. On the above contentions, the question presented for our consideration is, whether it is mandatory for a candidate set up by a

recognised political party to file original ink signed Forms A and B appended to para 13 of the 1968 Order.

29. Before we consider the above question, it is important to recapitulate the general rule relating to election law stated by the Constitution Bench of this Court in the case of *Jagan Nath*¹. This Court (at page 895) stated :

“The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions, however, have any application if the special law itself confers authority on a tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it. It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected.”

30. Section 33 of the 1951 Act enacts that a candidate shall file nomination paper on or before the appointed date in the

prescribed form. The form in which nomination paper shall be presented and completed is provided in Rule 4 of the 1961 Rules. According to Rule 4, every nomination paper presented under subsection (1) of Section 33 shall be completed in such one of the forms 2-A to 2-E, as may be appropriate. Proviso that follows Rule 4 provides that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of substantial character within the meaning of Section 36(4) of 1951 Act. The controversy in the present case relates to a candidate set up by a recognised political party of the State and, therefore, the relevant form in this regard is Form 2-B. Form 2-B is in three parts. Part-II is not relevant and, therefore, it is not necessary to refer to that. Part-I and Part-III of Form 2-B are relevant. Part-I of Form 2-B is required to be completed by a candidate set up by a recognised political party. Part-III of Form 2-B is a declaration to be made by the candidate giving assent to his nomination. The candidate is required to declare, in case of a candidate set up by a recognised State party in terms of para b(i), "that I am set up at this election by theparty, which is recognised national party/state party in this State and that the symbol reserved for the above party be allotted to me". Para b (ii) of Part-III is

applicable to a candidate set up by any registered unrecognised political party or a candidate who is contesting the election as an independent candidate. A plain reading of proviso that follows Rule 4 leaves no manner of doubt that a failure to complete or defect in completing, the declaration as to symbols in a nomination paper in Form 2A or Form 2B by a candidate set up by a recognised political party or a candidate set up by registered unrecognised political party or a candidate who seeks to contest the election as an independent candidate is not a defect of substantial nature. It is not possible to catalogue defects contemplated by the proviso. However, to illustrate the few; wrong description of symbol, omission to fill blank space given in proforma in respect of choice of symbols, selecting a symbol which is reserved, etc., fall in the category of defects not of a substantial character. We are fortified in our view by a decision of this Court in *Krishna Mohini (Ms) v. Mohinder Nath Sofat*² wherein this Court said in para 32 (Pg. 159) :

“32. Though Rule 4 of the Conduct of Elections Rules requires every nomination paper presented under subsection (1) of Section 33 to be complete in such one of the Forms 2-A to 2-E as may be appropriate and, therefore, the blank space meant for showing three symbols in order of preference as symbols of the candidate's choice, has to be filled in; however, non-filling of the space as to choice of symbol is not a defect of a substantial character. Such deficiency in the nomination paper is saved by the proviso to Rule 4 of the Conduct of Elections Rules, 1961 which

² (2000) 1 SCC 145

provides that failure to complete or defect in completing the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of Section 36. Choosing a wrong symbol, leaving blank the space meant for filling the choice of symbols and an error in describing the symbol — are all defects not of a substantial character. An independent candidate may mention as his preference the symbol reserved for a recognised political party, but that again will not be a defect of a substantial character. Dealing with such cases, this Court has held in *K.S. Abdul Azeez v. Ramanathan Chettiar* (AIR 1967 SC 85) that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled, on this ground, during the interval.”

31. The applicability of proviso that follows Rule 4, however, is limited to defect in the declaration as to symbol made by a candidate in Form 2-A or 2-B appended to 1961 Rules. Its operation does not extend to the defects in forms required to be filled or completed by a candidate set up by a recognised political party under 1968 Order or non-fulfilment of requirements set out in clauses (a) to (e) of para 13 of the 1968 Order.

32. 1968 Order has been made by the Commission to provide for specification, reservation, choice and allotment of symbols of elections in Parliamentary and Assembly Constituencies for the registered political parties (recognised or unrecognised) and the independent candidates. Para 13 provides in unmistakable terms that for a candidate to be considered to have been set up by a political

party in a parliamentary or assembly constituency, he has to comply with the conditions set out in clauses (a) to (e) thereof. In *Krishna Mohini (Ms)*², this Court held that in order to be a candidate set up by a registered and recognised political party so as to take advantage of being proposed by a single elector, all the four requirements set out in clauses (a), (b), (c) and (d) of para 13 of 1968 Order must be satisfied. The Court went on to say that if any one or more of the requirements are not satisfied, the benefit of nomination being proposed by a single elector is not available to him. Clause (e) of para 13 of the 1968 Order is equally important. It reads, "Forms A and B are signed, in ink only, by the said office-bearer or person authorised by the party". Proviso appended to para 13 makes a provision that no facsimile signature or signature by means of rubber stamp, etc. of any such office-bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted. In other words, for a candidate, proposed by a single elector alone, to be treated as a candidate set up by a recognised political party, the filing of notice and communication in Forms A and B referable to clauses (b), (c) and (d) and in accord with clause (e) of para 13 of the 1968 Order is essential and on its non-compliance, the nomination of such candidate is liable to be rejected.

33. That clause (e) of para 13, 1968 Order does not use the expression “shall be signed” is obvious from the bare reading of the provision but the significance of the word “only” therein cannot be ignored.

34. In Concise Oxford English Dictionary (Tenth Edition, Revised), the word ‘only’ is explained :

Only • adv. 1 and no one or nothing more besides.
• adj. alone of its or their kind; single or solitary.

35. In Webster Comprehensive Dictionary, International Edition (Volume Two), the word ‘only’ is defined thus :

Only (ōnlē) adv. 2 In one manner or for one purpose alone. 4 Solely; merely; exclusively: limiting a statement to a single defined person, thing, or number. – adj. 1 Alone in its class; having no fellow or mate; sole; single; solitary:

36. The word ‘only’ is ordinarily used as an exclusionary term. In the American case of *Henry R. Towne v. Mark Eisner* (245 US 418 at 425), the court said, “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used”. In ascertaining the meaning of the word ‘only’, its placement is material and so also the context in which the word has been used. The use of the word ‘only’ in clause (e), para 13, 1968

Order emphasises that Forms A and B are to be signed in ink by the office bearer or person authorised by the recognised party and in no other way. Thus, it excludes any other mode of filing Forms A and B when a candidate is set up by a recognised political party. In our view, therefore, the word ‘only’ used in clause (e) of para 13 is indicative of the mandatory character of that provision.

37. Where a candidate is set up by a recognised political party, clause (b)(i), Part-III of Form 2-B becomes relevant as by making declaration therein the candidate makes a request that symbol reserved for such party be allotted to him. It is for this reason that the requirements of para 13 of the 1968 Order become integral part of Form 2-B, Part-III under Rule 4 of the 1961 Rules where a candidate is set up by a recognised political party. We are unable to accept the submission of Mr. K.K. Venugopal that para 13 of the 1968 Order cannot be read into Rule 4. Non-compliance of requirements of para 13 of the 1968 Order, in our view, is a defect of substantial character and the nomination paper of a candidate proposed by a single elector set up by a recognised political party having such defect is liable to be rejected under Section 36(2)(b) as it tantamounts to non-compliance of the provisions of Section 33,

namely, the nomination paper having not been completed in the prescribed form.

38. The proposed candidate admittedly filed his nomination paper proposed by a single elector having been set up by BJD, a recognised political party in the State of Orissa, and, therefore, it was incumbent upon him that the requirements of para 13 of the 1968 Order were fully complied with. In other words, it was necessary for the proposed candidate that Forms A and B referable to clauses (b), (c) and (d) of para 13, 1968 Order were submitted to the Returning Officer duly signed in ink by the authorised person of BJD not later than 3.00 p.m. on April 4, 2009.

39. Having held so, the other questions that need to be considered by us in these appeals are, whether the High Court erred in framing issue no. 6 at the time of decision in the election petitions, i.e., whether the election petitioner Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorised person with the first set of his nomination and whether the finding recorded by the High Court on that issue suffers from any illegality.

40. The pleadings of the parties as well as the evidence let in by them clearly show that the parties were seriously in issue whether

the original Form-A and Form-B duly signed in ink by the authorised person of BJD were filed by the proposed candidate with the first set of his nomination paper. The election petitioners (in both election petitions) asserted that the proposed candidate had filed original Forms A and B duly signed in ink by Shri Navin Patnaik (authorised person of BJD) before the Returning Officer on April 4, 2009 at the time of presentation of nomination paper and check list was issued acknowledging receipt of these forms. The returned candidate disputed the said assertion made in the election petitions. The evidence of the Returning Officer, who was examined as court witness no. 1, and his cross-examination on behalf of the proposed candidate as well as the returned candidate also indicate that the factual controversy in the election petitions centered around on the filing of the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination. It follows that by framing issue no. 6 at the time of final decision of the election petitions, no prejudice has been caused to the returned candidate. As a matter of fact, no ground of prejudice has been raised in the appeals nor such argument was advanced before us by the learned senior counsel for the returned candidate. We, accordingly, hold that the High Court did not commit any error in framing issue no. 6 which

was quite vital and material for decision in the election petitions. We further hold that no prejudice has been caused to the returned candidate by framing such additional issue at the time of the decision in the election petitions.

41. The proposed candidate PW-2 deposed that he had contested Orissa Assembly Elections held in 1990, 1995, 2000 and 2004 from 89-Athagarh Constituency and had won all these four elections. While giving the details of nomination papers and the documents presented personally by him on April 4, 2009 at 11.25 a.m., he stated that in the first set of nomination, Rabindra Nath Rout (PW-1) was the proposer and along with the first set of nomination paper, original Form-A and Form-B signed in ink by Shri Naveen Patanaik, President and the authorised signatory of BJD were filed. He deposed that he had presented four sets of nominations as the nominee of BJD for 89-Athagarh Assembly Constituency and all his four sets of nominations were complete in all respect. He also deposed that immediately after he presented four sets of nominations, as a nominee of BJD, the Returning Officer asked him to take oath before him and he, accordingly, took oath before the Returning Officer. From 11.25 a.m. to 11.45 a.m., the Returning Officer examined the four sets of nominations presented by him and

thereafter the Returning Officer personally prepared the check list of documents; put his signature on that and asked him (proposed candidate) to sign on the said documents. The Returning Officer retained with him one of such check list ticked duplicate (Ex. 22) and handed over another to him (proposed candidate) ticked original (Ex. 11).

42. The deposition of the proposer—Rabindra Nath Rout (PW-1) is not of much help as he has stated that he was not present in the office room of the Returning Officer when the proposed candidate filed his nomination.

43. Significantly, the Returning Officer (CW-1) in his deposition has not specifically denied that Form-A and Form-B in original duly signed in ink by the authorised officer of BJD were not filed by the proposed candidate. Rather he stated that had it come to his notice that Form-A and Form-B duly signed in ink by the authorised signatory were not filed by the proposed candidate, he would have made an endorsement on the bottom of the check list to that effect and asked the proposed candidate to file the original ink signed forms within time. He admitted that no such endorsement was made in the check list. The Returning Officer also stated in his deposition that the nomination papers filed by the proposed candidate

were examined by him only from technical stand point and it was not his duty to examine the correctness or validity of the documents at the time of filing of the same.

44. Although there is voluminous documentary evidence, in our view, the three documents viz; the check list (Ex. 11), Form 3-A (Ex. 42/F) and the consolidated list of nominated candidates (Ex. 44) are important. The check list marked 'original' (Ex. 11) given to the proposed candidate is as follows :

Sl. No.	Documents	Whether filed (write yes/no)
1.	Affidavit in Form-26	yes
2.	Affidavit as per the Commission's order dated 27.03.03	yes
3.	Certified extract of electoral roll (when candidate is an elector of a different constituency)	Not needed
4.	Forms A and B (applicable in the case of candidates set up by political parties)	yes
5.	Copy of caste certificate (if the candidate claims to belong to SC/ST)	Not needed
6.	Security deposit (whether made)	yes
7.	Oath/affirmation (whether taken)	yes

The following documents which have not been filed should be filed as indicated below :

- (a) _____ should be filed latest by _____.
(b) _____ should be filed latest by _____.

Received.

.....
(Signature of candidate)

Date & time : 04.04.2009 -- 11.45 a.m.

Place : ATHAGARH"

45. List of nominated candidates—Checks If (Ex.44) to the extent it is relevant is as follows :

Name of Parliamentary/Assembly Constituency -89 Athagarh

No .	Name of the candidate	Address of candidate	Symbols chosen in Order of preference by the candidate.	Name of political Party (National/State or registered) by which the candidate claims to have been set up/independent candidate	Whether Forms 'A' and 'B' have been received by 3.00 p.m. on the last date for making nominations in respect of the candidate	Whether main candidate or substitute candidate of the party (as per Party's intimation in Form B)
1	2	3	4	5	6	7
1	Ranendra Pratap Swain	At- Radhago vindapur P.O.- Dhaipur, P.S. Athagarh Dist.- Cuttack	Cunch	Biju Janata Dal	Yes	Main Candidate

46. On April 4, 2009, the Returning Officer published a notice in Form 3A on the notice board of his office in respect of the nomination papers presented before him on that day. In that notice – Form 3A (Ex. 42/F), it was mentioned in column no. 6 that proposed candidate was nominee of BJD. Pertinently, April 4, 2009 was the last day of nominations. Form 3A was displayed on the notice board after 3 p.m. Had the proposed candidate not filed Forms A and B as required, i.e., duly signed in ink by an authorised person of BJD, he would not have been shown as a nominee of that party in Form 3A.

47. On behalf of the returned candidate it was contended before the High Court and reiterated before us that none of these documents indicate that Forms A and B were filed in original. It was submitted that these documents only indicate that Forms A and B were filed as endorsed in the check list and were received before 3.00 p.m. on the last date of making nominations but these documents do not prove that original Forms A and B signed in ink by the authorised signatory of the party were filed.

48. It is true that neither in the check list nor in the list of nominated candidates, the word ‘original’ before Forms A and B is mentioned but it was not required to be mentioned as in the case of candidates set up by political parties; the requirement is that such

candidates file Form A and Form B duly signed in ink by the authorised officer of the concerned political party. In the event of filing of Form A and Form B otherwise, an endorsement would obviously be made against that column in the check list and time would be given to make up the deficiency by 3.00 p.m. on the last day of nomination. In the circumstances, having regard to the significance of the check list, if Forms A and B were not filed in original by the proposed candidate, an endorsement would have been made by the Returning Officer that only xerox copies of Forms A and B were filed. No doubt under Section 33(4) of the 1951 Act, the Returning Officer is not expected to make a detailed scrutiny of the nomination paper presented before him but in the case of a candidate who has filed his nomination paper as a candidate set up by a recognised political party and in view of para 13 of the 1968 Order, the Returning Officer would surely check whether Form A and Form B suffer from any defect.

49. As a matter of fact, to obviate unnecessary dispute about presentation of nomination paper by a candidate, the Commission in the handbook has provided for guidelines pertaining to check list. Accordingly, a check list is required to be prepared duly certified by the Returning Officer that all documents have been received. Such

check list is signed by the Returning Officer as well as by the candidate. Where a check list certifies that Forms A and B (in the case of candidates set up by a recognised political parties), have been filed, such certificate leads to presumption that the procedural requirement of filing the documents as prescribed in para 13 of the 1968 Order has been complied with. The presumption is of course rebuttable but there must be sufficient evidence by the other side to displace such presumption. In the present case, the check list (Ex.11), Form 3A (Ex. 42/F) and the list of the nominated candidates —checks IF (Ex. 44) give rise to presumption in favour of the proposed candidate that he had filed Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination paper. The question is whether this presumption has been rebutted by the returned candidate? We do not think so. The oral evidence of the returned candidate (RW-1) and his witness (RW-2) is not of much help insofar as this aspect is concerned. The Returning Officer has not stated firmly and with certainty in his evidence that the proposed candidate had not filed Form-A and Form-B signed in ink by the authorised person of the BJD. Rather he stated that had it come to his notice that the original Form-A and Form-B duly signed in ink were not filed along with the nomination

paper by the proposed candidate, he would have made an endorsement to that effect in the check list. Moreover, between 11.46 a.m. when the check list was prepared by the Returning Officer and given to the candidate and 3.00 p.m. on April 4, 2009 (last date of nominations) no intimation was issued by the Returning Officer or received by the candidate with regard to non-filing of original Forms A and B. No doubt, the burden is on the candidate set up by a recognised political party to prove that he had filed Forms A and B duly signed in ink by the authorised person of that party but that burden gets discharged on production of evidence that raises presumption in his favour. In the present case the proposed candidate has been successful in discharging the burden placed upon him.

50. The evidence of the Returning Officer is the important part of the case. He admitted in his evidence that the xerox copies of the nomination papers and documents were got prepared through his officials for the purpose of displaying on the notice board. He also admitted that since proposed candidate had filed all documents required in the nomination form, no further endorsement was made in the check list that he (proposed candidate) was required to file any documents. Moreover, with regard to another candidate, Janaki Rout

in respect of 89-Athagarh Assembly Constituency, the Returning Officer stated that he asked him to file the document which he had not filed along with the nomination paper by 3.00 p.m. at the latest. In respect of yet another candidate Bijaya Kumar Biswal, in the check list, he had endorsed therein that the certified extract of the electoral roll was not filed and asked him to file the same at 11.00 a.m. on April 6, 2009 at the latest. It is, thus, seen that the Returning Officer was conscious of his duties as per the statutory provisions and the guidelines issued by the Commission by way of handbook. On presentation of nomination papers by respective candidates wherever deficiencies were found, he made endorsement in the check list and gave them time to make up the deficiency as per law. A careful consideration of the evidence of Returning Officer leaves no manner of doubt that he has not distorted the facts nor withheld anything from the court with regard to presentation of nomination papers by the candidates including the proposed candidate. The evidence on record, i.e, the evidence of the Returning Officer, the documentary evidence, namely, the check list, Form 3A displayed on the notice board, the consolidated list of nominated candidates and the evidence of PW-2 clearly establish that original Form-A and Form-B signed in ink by authorised officer of the party (BJD) were presented

by the proposed candidate along with 1st set of nomination paper on April 4, 2009. The finding returned by the High Court in this regard cannot be said to be wrong or unjustified.

51. It is a fact that the original Forms A and B were not available on record before the Returning Officer on April 6, 2009 at the time of scrutiny. However, we are not persuaded by the submission made on behalf of the returned candidate that in the absence of original Forms A and B on record, the Returning Officer had to proceed on the basis of records available before him on that day and he had no option but to reject the nomination. The least expected of the Returning Officer, when he found that original forms A and B were not available on record, was to make brief enquiry about non-availability of the forms A and B. It was all the more necessary as the nomination papers along with accompanying documents were sent for xeroxing.

52. Section 83 of the 1951 Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. It has been repeatedly held by this Court that Section 83 is peremptory. In *Samant N. Balakrishna, etc. v. George Fernandez and others etc.*³, this Court observed in para 29 (Pg. 1212) of the Report thus:

³ AIR 1969 SC 1201

“.....The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word ‘material’ shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct.....”

53. In *Azhar Hussain v. Rajiv Gandhi*⁴, this Court held that an election petition must be dismissed if the mandatory requirements enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with.

54. In *Hari Shanker Jain v. Sonia Gandhi*⁵, this Court reiterated the mandatory provision contained in Section 83(1)(a) of the 1951 Act and observed therein that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, this Court said that they must be such facts as would afford the basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908.

⁴ AIR 1986 SC 1253

⁵ (2001) 8 SCC 233

55. A 3-Judge Bench of this Court in *Pothula Rama Rao v. Pendyala Venakata Krishna Rao and Others*⁶, stated in paragraph 8 (at Pg. 6) of the Report as follows :

"If an election petitioner wants to put forth a plea that a nomination was improperly rejected, as a ground for declaring an election to be void, it is necessary to set out the averments necessary for making out the said ground. The reason given by the Returning Officer for rejection and the facts necessary to show that the rejection was improper, should be set out. If the nomination had been rejected for non-compliance with the first proviso to Sub-section (1) of Section 33, that is, the candidate's nomination not being subscribed by ten voters as proposers, the election petition should contain averments to the effect that the nomination was subscribed by ten proposers who were electors of the Constituency and therefore, the nomination was valid. Alternatively, the election petition should aver that the candidate was set up by a recognized political party by issue of a valid 'B' Form and that his nomination was signed by an elector of the Constituency as a proposer, and that the rejection was improper as there was no need for ten proposers. In the absence of such averments, it cannot be said that the election petition contains the material facts to make out a cause of action."

56. In a recent decision in *Nandiesha Reddy v. Kavitha Mahesh*⁷, this Court observed that where election petitioner alleges improper rejection of his/her nomination paper by the Returning Officer, he/she must set out in election petition reasons given by the Returning Officer for refusal to accept nomination paper and facts necessary to show that refusal was improper. In paragraphs 36 and 37 of the Report (at Pg. 734), this Court held as under :

⁶ (2007) 11 SCC 1

⁷ (2011) 7 SCC 721

“36. Section 83 (1)(a) inter alia provides that an election petition shall contain a concise statement of the material facts. Further, Section 87 of the Act provides that subject to the provisions of the Act and the Rules framed thereunder every election petition shall be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Order VI of the Code of Civil Procedure is devoted to the pleadings generally and Rule 2(i) thereof, inter alia, provides that every pleading shall contain a statement in a concise form of all the material facts on which the party pleading relies for claim. In an election petition, which does not contain material facts, no relief can be granted.

37. The phrase “material fact” as used in Section 83 (1) (a) of the Act or Order 6 Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard.”

57. In view of the above legal position, there is no doubt that in a case under Section 100(1)(c) of the 1951 Act, the only issue before the Court is improper rejection of nomination paper and the court is required to examine the correctness and propriety of the order by which the nomination paper of a candidate is rejected. The grounds set out in the election petition challenging the order of rejection of nomination paper, thus, form the basis of adjudication in the election petition.

58. The learned senior counsel for the appellant submitted that the material facts relating to the ground on which election of the returned candidate has been set aside have neither been pleaded in the election petition nor have been proved by leading cogent evidence. We do not find any merit in this contention.

59. In the Election Petition No. 4 of 2009 filed by the proposed candidate, the order of rejection of nomination has been assailed, inter alia, on the following grounds:

“5(C) That the reasonings given in the decision of the Returning Officer, in his order of rejection dtd. 06.04.2009 is also not legally sustainable for the following reasons :-

(a) The Nominee of B.J.D. Nominee for 87-BARAMBA Assembly Constituency was submitted on 03.04.2009. The Returning Officer had the occasion to examine the same and grant the Check List on 03.04.2009 i.e. one day before the submission of the Nomination of the Election Petitioner, whereas the Election Petitioner submitted his Nomination on 04.04.2009. If according to the Returning Officer, “from comparison of two sets of Form A & B submitted in 87- BARAMBA, he came to conclusion that the set of Form A & B, submitted by the Election Petitioner along with his first set of Nomination was not original and not signed in ink but a xerox copy, then in ordinary course of human conduct and in view of instruction of the Election Commission”, he would have recorded an endorsement to that effect in the CHECK LIST which he himself gave at 11.45 AM on 04.04.2009, and would have further called upon the Election Petitioner to produce the same by 3 PM on the same day.

(b) The Returning Officer instead of making a comparison with the Form A & B submitted along with the Nominations of 87-BARAMBA, should have referred to the Form A & B, which was communicated both to him & to the CEO under the provisions of Election Symbol (Reservation & Allotment) Order – 1968.

- 5(D) That a plain reading of four Orders of rejection recorded by the Returning Officer on four sets of Nominations submitted by the Election Petitioner spells out so much so discrepancy that the same itself is sufficient to conclude that the order suffers from inconsistency and is an outcome of non application of mind.
- 5(E) That on the date of scrutiny no objection was raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny to the effect that the Form A & B, filed by the Election Petitioner with his first set of "NOMINATION" were not original not it contains the signature of the authorised person IN INK were Xerox copies.

The complaint was raised by the Returning Officer himself who had received all the four sets of Nominations, along with other affidavits, documents original money receipt and original Form A & B, duly signed in ink, by the authorised person, and had signed the CHECK LIST which is a document required to be signed & delivered to the candidate in exercise of his statutory powers on 04.04.2009. The partisan attitude and hostility of the Returning Officer towards the Election Petitioner emanates from his own conduct, when he refused minimum opportunity to the Election Petitioner to REBUT the so called allegations regarding non-submission of original Form – A & B containing signature of authorised person in ink, which a candidate is entitled to as of right under the Rules of Election Law."

60. The High Court, inter alia, considered the evidence of PW-2 and also the evidence of the Returning Officer, the documentary evidence, namely, the check list (original-exhibit 11), Form 3-A (exhibit 42/F) and consolidated list of nominated candidates

—checks IF (exhibit-44) and the contentions of the returned candidate and held as under :

“13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swain. They further deposed that while handing over the Check List, the Returning Officer stated that “whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election Petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext. 22 to him. He fairly admitted in his evidence that he can distinguish a xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 04.04.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox Copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated “List of Nominated Candidates-Checks if”. He could not detect the so called defect. He mentioned the symbol “Conch” in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W. 1 the proposer of Ranendra Pratap Swain, partially got effected, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he filed to detect the Xerox

copies of the original ink signed Form A and Form B, if filed. The original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks if" have been admitted as Exts. 42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision State of Orissa and others (supra) their probative value is also very high. Even if those documents were not referred to in the election petitions, the evidence led in that respect can be accepted."

61. The High Court finally concluded that the proposed candidate had filed the original Form-A and Form-B duly signed in ink by the authorised person of BJD with the first set of his nomination and, accordingly, decided Issue No. 6 in favour of election petitioners. The consideration of the matter by the High Court in para 14 of the judgment may be reproduced as it is.

"14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered

opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 Supreme Court 1657, where the apex Court held as follows.

“Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant.”

As found from the evidence of P.Ws. 1 and 2 the latter filed the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W. 1 that P.W. 2 did not file original ink signed Form A and Form B in his 1st set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 04.04.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were Xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed Form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorised person with the 1st set of his Nomination. Accordingly, issue no. 6 is answered in affirmative.

62. In what we have already discussed above, we do not find any error in the consideration of the matter by the High Court.

63. The election petitioner, as noticed above, in ground 5(E) set up the case that the objection of non-filing of original Forms A and B signed in ink by the authorised officer of the party was not raised by any of the contesting candidates or any person on their behalf present at the time and place of scrutiny. It was the Returning Officer who raised the issue of non-filing of original Forms A and B but he refused minimum opportunity to the election petitioner to rebut the same. In our view, the Returning Officer ought to have acted in terms of proviso to Section 36(5) of the 1951 Act and afforded an opportunity to the election petitioner until next day to rebut the objection and show to the Returning Officer that the proposed candidate had filed Forms A and B duly singed in ink by the authorised person of BJD. PW-3, the authorised representative of the election petitioner did state in his evidence that he requested to the Returning Officer, when he raised the objection that original Forms A and B were not filed, to enquire into the matter about the missing Forms A and B. It was not necessary to state in the election petition the evidence of PW-3 in support of ground 5(E).

64. The proviso that follows sub-section (5) of Section 36 of the 1951 Act provides that in case an objection is raised by the returning officer or is made by any other person the candidate

concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

65. In *Rakesh Kumar v. Sunil Kumar*⁸, this Court held in para 21 (Pg. 500) as under:

"21.The use of the expression "not later than the next day but one following the date fixed for scrutiny" under the proviso to Sub-section (5) of Section 36 of the Act un-mistakably shows that the Returning Officer has been vested with the discretion to fix time to enable a candidate to rebut an objection to the validity of his nomination paper and such a discretion has to be fairly and judicially exercised. The refusal to grant an opportunity to the respondent and rejecting his nomination paper was clearly an arbitrary exercise of the discretion vested in the Returning Officer. The Returning Officer has also not given any cogent reasons for his refusal to grant an opportunity as prayed for by the respondent. The Returning Officer appears to have been labouring under some misconception when he recorded that the political party "cannot be given further time to change such authorisation after scrutiny". Under the proviso to Section 36(5) of the Act, the scrutiny itself would have been postponed to the adjourned time and, therefore, it was not a case of meeting the objection after scrutiny of the nomination papers. The failure to exercise his jurisdiction to postpone the decision as to the validity of the nomination paper of the respondent, even after the respondent had sought time to meet the objection, indeed rendered the rejection of the nomination paper of the respondent as both improper and illegal. The Returning Officer is not expected to reject a nomination paper, without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection, capable of being met, particularly where such an opportunity is sought for by the candidate or his

⁸ (1999) 2 SCC 489

representative and no one present on behalf of the other candidates had opposed the claim made by the respondent. Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its official candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell in a grave error in rejecting the nomination paper of the respondent.....”

66. In the facts and circumstances of the present case, which have already been noticed above, the Returning Officer erred in acting in hot haste in rejecting the nomination paper of the proposed candidate and not postponing the scrutiny to the next day, particularly, when a request was made by the authorised representative of the proposed candidate. The election petitioners have been successful in proving the improper rejection of the proposed candidate's nomination paper. In other words, they have been able to prove the ground for setting aside appellant's election to 89-Athagarh Assembly Constituency under Section 100(1)(c) of the 1951 Act.

67. The consideration of the matter by the High Court does not suffer from any factual or illegal infirmity. In this view of the

matter – and the factual and legal position discussed above- we see no ground to interfere with the impugned judgement.

68. The appeal, accordingly, fail and are dismissed with no order as to costs.

...../

(R.M. LODHA)

...../

(JAGDISH SINGH KHEHAR)

NEW DELHI

DECEMBER 9, 2011.

By order,

(R.K. SRIVASTAVA)
PRINCIPAL SECRETARY
ELECTION COMMISSION OF INDIA

ELECTION COMMISSION OF INDIA
Nirvachan Sadan, Ashoka Road, New Delhi –110 001

Dated: 26th December, 2011
5, Pausha, 1933 (Saka)

NOTIFICATION

No.82/OR-LA/(4/2009)/2010:- In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the Judgement and Order of the High Court of Orissa: Cuttack, dated 23.06.2010 in Election Petition No.4 of 2009 filed by Sri Ranendra Pratap Swain challenging the election of Shri Ramesh Rout to the Legislative Assembly of Odisha from 89-Athagarh Assembly Constituency.

R.N.BISWAL, J.

ELECTION PETITION Nos. 4 & 6 of 2009 (Decided on 23.6.2010)

RANEDRA PRATAP SWAIN & ANR. Petitioners.

.Vrs.

RAMESH ROUT Respondent.

REPRESENTATION OF PEOPLE ACT, 1951 (ACT NO.43 OF1951) – SEC,36 (5).

For Petitioner – M/s. Bidyadhar Mishra, G.Agarwal, A.K.Mishra,
P.K.Nayak, S.Satapathy.

For Respondent – M/s. Subir Palit, A.K.Mohapatra, A.K.Mishra
S.K.Satpathy, A.K.Mahana, A.Dey, B.Biswal,
A.Mishra, H.K.Ratsingh, D.N.Patnaik,A.Kejriwal.

For Petitioner – M/s. Pitambar Acharya, P.K.Ray, B.Bhadra,
J .R.Chhotray, S.Rath.

For Respondent – M/s.Subir Palit, a.K.Mohapatra, A.K.Mishra,
S.K.Satpathy, a.K.Mahana, A.Dey, D.Biswal,
A.Mishra, H.K.Ratsingh, D.N.Patnaik, A.Kejriwal.

R.N.BISWAL,J. The petitioner, in Election Petition No.4 of 2009 challenges the declaration of result dated 16.05.2009 declaring the sole Respondent, Ramesh Rout, to have been elected as Member of the Orissa Legislative Assembly from 89-Athagarh Assembly Constituency on the ground that rejection of his nomination by the Returning Officer is illegal and improper. He has prayed to:

- i) declare the election of the respondent to be void;
- ii) declare that a casual vacancy has been created so far as it relates to 89-Athagarh Assembly Constituency and
- iii) direct the appropriate authority to conduct election with respect of 89-Athagarh Assembly Constituency within the time specified/prescribed under law and other ancillary reliefs.

In Election Petition No.6 of 2009, Rabindra Nath Rout has also challenged the said election on the same ground substantially with the same prayer. So, both the election petitions were heard analogously and as such a common judgment is passed there under.

2. The schedule of election relating to 89-Athagarh Assembly Constituency is as follows:

28.3.2009 to

04.04.2009	Period prescribed for filing of "NOMINATIONS"
06.04.2009 :	Date fixed FOR SCRUTINY OF NOMINATIONS
08.04.2009 : :	Last date for WITHDRAWAL OF NOMINATIONS
23.04.2009 :	Date of POLLING
16.05.2009 :	Date of COUNTING OF VOTES
28.05.2009 :	Date before which the Election shall be completed

During the period prescribed, eight candidates including the petitioner in E.P. No.4 of 2009, Sri Ranendra Pratap Swain filed their respective nominations. As per the election petitions on 4.4.2009 at 11.25 A.M., Sri Ranendra Pratap Swain presented four sets of Nomination along with the required documents before the Returning Officer. In the 1st set of Nomination, he filed the original Form-A and Form-B, signed by the authorized person in ink, showing that he had been set up by Biju Janata Dal to contest as party nominee, whereas with the other three sets of Nomination, he filed three sets of Xerox copies of the original of Forms-A and Form-B duly authenticated by notary, Shri Ambika Prasad Ray, Advocate. The Returning Officer carried out preliminary examination of the Nomination and all accompanying documents then and there and granted Check List in token of receipt of the four sets of Nomination including the required documents at 11.45 A.M. on the same date. According to the election petitioners, if any of the documents was not filed along with the Nomination, it was obligatory on the part of the Returning Officer to mention the same in the bottom of the Check List, indicating the time limit by which, it would be submitted. No such endorsement was made in the Check List granted to the petitioner. On the date of scrutiny, no objection was raised by any of the contesting candidates or any person on their behalf that Form-A and Form-B filed by Sri Ranendra Pratap Swain with his first set of Nomination, were not in original, containing the signature of the authorized person in ink. The complain was raised by the Returning Officer himself that Forms-A and Form-B were two Xerox copies and that the same were not signed in ink by the authorized person. The representative of the election petitioner, Sri Ranendra Pratap Swain requested the Returning Officer in writing to allow some time to rebut the allegation regarding non-submission of the original Form-A and Form-B, containing the signatures of the authorized person in ink, but, he rejected the same illegally. Due to the illegality committed by the Returning Officer, the Petitioner could not contest the election. The result of the election was declared on 16.05.2009 and respondent was declared elected. Thereafter, within the statutory period, the petitioner filed the present election petition with the prayer as here-in-before stated.

3. The respondent in his written statement denied the averments of the petitioners that election petitioner, Sri Ranendra Pratap Swain filed Form-A and Form-B in original in his first set of Nomination. According to him, at the stage of filing the Nomination along with other documents, Returning Officer is required only to make a preliminary examination of the same; detailed scrutiny is not required at that stage. All that is required at that stage is disclosure by the candidate as to what

documents he has filed. A Check List is issued to the candidate by the Returning Officer as a proof of the fact that the documents disclosed by the candidate have been filed along with the Nomination. It can not prove the genuineness or the correctness of the documents referred to in it. Non-filing of original Form-A and Form-B signed in ink being a defect of substantial nature, the Returning Officer has rightly rejected the Nomination of Sri Ranendra Pratap Swain. Since it is the case of the election petitioner that he had filed the original Form-A and Form-B, the question of granting him opportunity, to rebut the objection raised by the Returning Officer, did not arise. The Respondent has also taken the plea that the election petitions are bad for non-joinder of necessary party. According to him, eight candidates contested the election for 89-Athagarh Assembly Constituency, out of whom, petitioners only chose the respondent to array him as a party. As such election petitions are bad for non-joinder of necessary party. Furthermore, he has taken the plea that the election petitions are not maintainable.

4. On the basis of above pleadings of the parties, the following issues are framed.

1) Whether the Election Petition is maintainable?

2) Whether it is bad for non-joinder of necessary parties?

3) Whether the Returning Officer improperly rejected the Nomination of the Election Petitioner in violation of the statutory provisions and rules?

4) Relief if any, the Election Petitioner is entitled to?

5) Whether the Returning Officer improperly rejected the Nomination of Sri Ranendra Pratap Swain, the official candidate of Biju Janata Dal in violation of the instructions issued by the Election Commission of India in exercising of its constitutional powers and the principles of natural justice or not ?

As per the pleadings of the petitioners, election petitioner, Sri Ranendra Pratap Swain, filed original Forms-A and Form-B being duly signed by ink by the authorized person with his 1st set of Nomination, which is denied by the respondent. The parties led evidence to establish their stands in this regard, but no specific issue has been framed there under. So it would be just and proper to add the following issue as issue no.6.

Issue No.6

Whether the Election Petitioner Sri Ranendra Pratap Swain filed the original Form-A and Form-B being duly signed in ink by the authorized person with the 1st set of his Nomination?

5. In order to establish their case, the petitioners examined three witnesses- P.W.1 is election petitioner in E.P. No.6 of 2009 and also the proposer of Sri Ranendra Pratap Swain in the 1st set of Nomination, P.W.2 is Sri Ranendra Pratap Swain and P.W.3 is his authorized agent to the scrutiny of his Nomination along with the required documents. Respondent examined 4 witnesses- R.W.1 is the respondent himself, R.W.2 is a witness to a scooter accident, caused by Ranendra Pratap Swain, on the date of filing Nomination, R.W.3 is a witness to the filing of Nomination by Sri Ranendra Pratap Swain and R.W.4 is a witness who heard the Returning Officer enquiring about B.J.D. Party ticket. The Returning Officer was examined as Court Witness No.1.

6. Issue No.6. For the sake of convenience, issue no.6 is taken up for consideration first. It transpires from the evidence of P.Ws.1 and 2 that on 04.04.2009 at 11.25 A.M. the Election Petitioner, Sri Ranendra Pratap Swain submitted four sets of Nomination along with the required documents including original Form-A and Form-B signed in ink, by Shri Nabeen Patanaik, President, Biju Janata

Dal, who was the authorized signatory to sign such forms on behalf of Biju Janata Dal, before the Returning Officer. All the four sets of Nomination together with accompanying documents were thoroughly verified by the Returning Officer in their presence and in presence of others whereafter he granted the Check List to the election petitioner, Sri Ranendra Pratap Swain at 11.45 a.m. on 04.04.2009.

7. It further transpires from their evidence that while handing over the Check List to Sri Ranendra Pratap Swain, the Returning Officer said "what ever original Forms and documents that you have given/submitted and I have received from you, have been clearly mentioned by me in this "Check List, You preserve this Check List with you". No suggestion was given to P.W.1 that the original Form A and Form B singed in ink by Shri Nabeen Patanaik, President of Biju Janata Dal were not filed in the 1st set of Nomination. On perusal of the evidence of witness no.1 for the Respondent (Respondent himself), it is found that he has specifically stated on oath that he was not present in the office room of the Returning Officer while Sri Ranendra Pratap Swain filed his Nomination. As such, he could not say whether he filed the 1st set of Nomination along with other original documents, including Form-A and Form-B. Similarly, Court witness No.1, the Returning Officer in his evidence, could not positively say that Ranendra Pratap Swain did not file original Forms A and Form B signed in ink. He specifically stated that in case it had come to his notice that Form A and Form B were not signed by the authorized signatory in ink, he would have endorsed it on the bottom of the Check List and asked the candidate to file the original ink signed copy of the said forms within time. Admittedly, there was no such endorsement in both the Check Lists-original and the duplicate, marked as Exhibits 11 and 22. Of course, in his evidence, Court witness No.1 has stated that he examined the Nomination along with the required documents from technical stand point only. It was not his duty to examine the correctness or validity of the documents at the time of filing the same. On 6.4.2009, during scrutiny of the Nomination along with other required documents, he came to know that Sri Ranendra Pratap Swain did not file the original Form-A and Form-B signed in ink, instead he filed the Xerox copies thereof. Since he had filed the Nomination along with all required documents, he did not endorse in the Check List indicating that he was required to file any document.

8. Learned senior counsel, Sri B.Mishra appearing for the Election Petitioner, Ranendra Pratap Swain submitted that as found from the evidence of P.W.1, the proposer of Ranendra Pratap Swain, with respect to first set of Nomination, since his signature in the Nomination was partially effaced by coming in contact with sweat while handling the documents, the Returning Officer asked him to put another signature and accordingly, he put his second signature. When confronted to the Court Witness No.1, he failed to recollect the same. But the Nomination in Ext.4 shows that P.W.1, Rabindra Rout has put two signatures in the space meant for signature of proposer and that one of the signatures has been partially effaced. This shows that the Returning Officer meticulously examined the Nomination and the accompanying documents. The Returning Officer has specifically stated in his evidence that he can distinguish between a original document and the Xerox copy thereof. According to Mr. Mishra the Returning Officer did not make any endorsement in the Check Lists, marked Exts.11 and 22 because Form A and Form B were filed in original.

9. Mr. Mishra further submitted that as per para 22, Chapter-V of the Hand Book of Returning Officer, after 3 P.M. on each day between the date of notification and the last date for making nominations, the Returning Officer is required to publish on his notice board a notice of the Nomination Papers presented before him on that date in Form 3-A. In the instant case, on 4.4.2009, the Returning Officer duly notified the same in Form-3 A (Ext.42/f) indicating under column No.6 thereof that the election petitioner, Ranendra Pratap Swain is the nominee of Biju Janata Dal. So, he must have verified Form-A and Form-B.

10. Mr. Mishra further submitted that again as required under para-29.1 Chapter-V of the Hand Book of Returning Officer and the instruction issued by the Election Commission of India, immediately after the last date and time fixed for filing Nomination Papers, the Returning Officer is duty bound to submit the consolidated "List of Nominated Candidates-Checks If", in the prescribed formant to the Chief Electoral Officer of the State and other Statutory Authorities including Election Commission of

India. In the case at hand, the Returning Officer submitted the consolidated "List of Nominated Candidates-Checks If", (Ext-44), to the Chief Electoral Officer of Orissa and

other Statutory Authorities, where at Column No.4 against the name of Shri Ranendra Pratap Swain, the symbol "Conch" has been mentioned. With regard to political party affiliation, the Returning Officer mentioned in column no.5 of Ext.44/f that he was set up by "Biju Janata Dal". He has also endorsed in Column No.6 thereof as "Yes" meaning thereby that he received Form A and Form B from Ranendra Pratap Swain by 3.00 P.M. dated 4.4.2009. He has also endorsed as "Main Candidate" in column No.7 of the said document, thereby indicating that Shri Ranendra Pratap Swain was the main candidate set up by Biju Janata Dal. According to Mr. Mishra, the Returning Officer must have verified Form A and Form B, before he filled up column Nos.4 to 7 of the consolidated List of Nominated Candidates-Checks If". So, according to him, it is clearly established that after verifying Form A and Form B of the Election Petitioner, Ranendra Pratap Swain carefully and being satisfied that he submitted the original Form A and Form B, duly signed in ink by the authorized signatory of Biju Janata Dal, the Returning Officer mentioned the details in the above Statutory Form and submitted the same to the Statutory Authorities. He further submitted that Exts 11,22 and 42/f,43 and 44 are all statutorily maintained documents being prepared by a public officer in due discharge of his public duty. So their probative value is very high. In support of his submission, he relied on the decision **State of Bihar Vs. Sri Radha Krishna Singh & Others**, AIR 1983 SC, page-684.

11. Mr. Palit, learned counsel appearing for the sole Respondent contended that at the stage of filing of Nomination Papers, the Returning Officer is required to only make a preliminary examination of the same and no detailed scrutiny is required at that stage. All that is required at that stage, is the disclosure by the candidate of the documents he has filed. Check List is issued to a candidate as proof of the documents disclosed by him to have been filed along with the Nomination papers. It does not prove the genuineness and correctness of the documents referred to in it. Had it been the intention of the Legislature requiring the Returning Officer to conduct a detailed enquiry at the stage of filing of the Nomination papers, then there was no need of inserting Section 36 to the Representation of the People Act, 1951 which envisages about scrutiny of such documents. In the instant case, the Returning Officer has rightly stated on oath before this court that he did not verify the validity or genuineness of the documents accompanied with the Nomination at the stage of filing of the same. So according to learned counsel for the Respondent, only because the Check List was issued showing receipt of documents filed by the election petitioner, Ranendra Pratap Swain without any endorsement below it, it would not confirm that original ink signed Form A and Form B were filed. Similarly, the information given in Form 3A, marked as Ext 42/f and the consolidated "List of Nominated Candidates-Checks If" marked as Ext 44 cannot confirm that original Form A and Form B signed in ink were filed. He further submitted that no averment was made in either of the election petitions with regard to Form 3A and the Consolidated "List of Nominated candidates-Checks If". So, in absence of such averment in the pleadings, the evidence with regard to form 3A and the consolidated "List of Nominated Candidates-Checks If", cannot be relied upon.

12. Learned counsel appearing for the sole respondent further submitted that P Ws 1 and 2 in their evidence in affidavit stated that, while handing over the Check List on 4.4.2009 at 11.45 A.M. to Shri Ranendra Pratap Swain, the Returning Officer said that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List, you preserve the Check List with you." But there is no pleading to that effect. So, the same cannot be relied upon.

13. As found from the evidence of P.Ws 1 and 2, the latter filed four sets of Nomination along with other accompanying documents. In the 1st set of Nomination Papers, he filed original ink signed Form A and Form B. Accordingly, the Returning Officer issued the Check List to Sri Ranendra Pratap Swan. They further deposed that while handing over the Check List, the Returning Officer stated that "whatever original forms and documents that you have submitted and I have received from you have been clearly mentioned by me in the Check List. You preserve the Check List with you. If in fact the Returning Officer had stated so, it being a material fact, the same should have been averred in the

election petition. In absence of pleading this part of evidence of P.Ws 1 and 2 cannot be relied upon. According to the evidence of Returning Officer, on examining the documents on technical stand point, he found the election petitioner, Sri Ranendra Pratap Swain to have filed all required documents and accordingly he issued the Check List marked Ext 22 to him. He fairly admitted in his evidence that he can distinguish a Xerox copy from its original. He further deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form A and Form B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. Again on 4.4.2009 after the time fixed for filing the Nomination Papers was over, he prepared copy of those documents in Form 3A to publish in the notice board. At that time also he could not detect the filing of Xerox copies of the original ink signed Form A and Form B. Furthermore, when he prepared the consolidated "List of Nominated Candidates-Checks If", he could not detect the so called defect. He mentioned the symbol "Conch" in the appropriate column of the said form so also the name of political party, which set up the candidate, Sri Ranendra Pratap Swain. Since the signature of P.W.1 the proposer of Ranendra Pratap Swain, partially got effaced, the Returning Officer asked him to put another signature and accordingly he did it. When the Returning Officer was alive to find out an effaced signature in the Nomination, it appears some what fishy how he failed to detect the Xerox copies of the original ink signed Form A and Form B, if filed. The contention of learned counsel for the respondent that there was no pleading with regard to Form 3A and consolidated "List of Nominated Candidates-Checks If" in either of the election petitions and as such the same cannot be relied upon cannot be accepted. It is the fundamental rule of pleadings that pleading must contain a statement of the material facts, but not the evidence by which they are to be proved. In the present case, it has been averred in the election petitions that Shri Ranendra Pratap Swain filed the Nomination along with required documents including original Form A and Form B ink signed, before the Returning Officer. Moreover, Form 3A and consolidated "List of Nominated Candidates-Checks If" have been admitted as Exts.42/f and 44 respectively without objection. So their validity cannot be questioned. As per the decision State of Orissa and others (supra) their probative value is also very high. Even if those documents were not referred to in the election petitions, the evidence led in that respect can be accepted.

14. No doubt at the time of filing of Nomination, the Returning Officer is not required to scrutinize the Nomination and the accompanying documents in minor details, but he is duty bound to examine the same on technical stand point. Now the pertinent question is whether he was expected to examine whether the original ink signed Form A and Form B were filed, while examining the Nomination Paper along with the accompanying documents, on technical stand point. In my considered opinion, he had to do so, particularly when he deposed that had it come to his notice that Sri Ranendra Pratap Swain filed the Xerox copies of the original ink signed Form-A and Form-B, he would have endorsed it in the bottom of the Check List and directed him to file the original ones. At this stage Mr. Palit, learned counsel for the respondent submitted that unless, an election petitioner fully established his case, it would not be proper to set aside the election. In support of his submission, he relied on the decision in the case of **Ram Phal Kundu vs. Kamal Sharma**, AIR 2004 Supreme Court 1657, where the apex Court held as follows:-

"Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant."

As found from the evidence of P.Ws. 1 and 2 the latter filed the original ink signed Form A and Form B in his 1st set of Nomination. This part of their evidence could not be shaken. Even no suggestion was given to P.W.1 that P.W.2 did not file original ink signed Form A and Form B in his 1st set of Nomination. So, the above decision is not applicable to the present case.

The Returning Officer has admitted in his evidence that the Nominations along with all the accompanying documents of all the eight candidates were Xeroxed outside in Anand Xerox of Athagarh. He has also admitted that on 4.4.2009 all the four sets of Nomination papers of Sri Ranendra Pratap Swain were xeroxed to display the same in his Notice Board. The possibility that, in the process the original ink signed form A and Form B were inadvertently exchanged for the Xerox copies thereof, cannot be ruled out. Under such premises, in my considered opinion, Sri Ranendra

Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorized person with the 1st set of his Nomination. Accordingly, issue no.6 is answered in affirmative.

15. **Issue Nos.3 and 5.** It transpires from the evidence of P.Ws 1 and 3 that the latter was authorized by the election petitioner, Sri Ranendra Pratap Swain, in writing as per Ext.46 to represent him at the time of scrutiny of his Nomination Papers. Scrutiny of Nomination Papers in respect of 89-Athagarh Assembly Constituency continued from 1.45 P.M. to 2 P.M. on 6.4.2009. No objection was raised to the Nomination of election petitioner, Ranendra Pratap Swain, by any of the candidates or their proposers or agents. The Returning Officer himself raised suo-motu objection that the original ink signed Form A and Form B were not filed by Shri Ranendra Pratap Swain. P.W.3 showed the duplicate Check List, Ext.22 to the Returning Officer stating that he (Returning Officer) personally received the said forms and acknowledged receipt of the same. Both P.Ws. 1 and 3 requested the Returning Officer to show them those two documents, but, he did not allow them to see the same. So, P.W.3 filed an application for time (Ext.47) to rebut the objection, but it was turned down. Then the Returning Officer rejected all the four sets of Nominations of Sri Ranendra Pratap Swain. Learned senior counsel Sri B.Mishra submitted that as required under the proviso to section 36(5) of the Representation of the People Act, 1951, the Returning Officer was duty bound to give an opportunity to rebut the allegation that Form A and Form B were not the original ink signed documents. But despite the application made by P.W.3 to give such an opportunity, the Returning Officer turned it down whereby the election petitioner, Ranendra Pratap Swain was highly prejudiced and on this ground alone, the election petition should be allowed. In support of his submission he relied on the decision **Rakesh Kumar Vs. Sunil Kumar**, AIR 1999 SC page 935. **Smt. Maneka Gandhi vs. Union of India**, AIR 1978 SC 597, **Jagannath Ramachandra Nunekar vs. JenuGovinda Kadam and others** AIR 1989 SC 475. Per contra, learned counsel appearing for the sole Respondent contended that as per the evidence of Returning Officer, he did not grant time since date of filing the Form A and Form B had already been over. Even if time had been allowed, the election petitioner, Ranendra Pratap Swain or his agent could not have legally filed the original ink signed Form A and Form B on the date of scrutiny, as such, there was no violation of natural justice causing prejudice to any one. In support of his submission he relied on the decisions, **State Bank of Patialla and others Vs. S.K.Sharma** (1996) 3 SCC 364 and **Aligarh Muslim University and others Vs. Mansoor Ali Khan**, (2000) 7 SCC 529.

16. Admittedly, the date for filing Nomination along with other relevant documents including Form A and Form B was fixed to 4.4.2009. If the original ink signed Form A and Form B had not been filed on 4.4.2009, the same could not have been legally filed on the date of scrutiny i.e. on 6.4.2009, which was fairly conceded to by Mr. B. Mishra. But he submitted that, had he been given a chance, the election petitioner, Sri Ranendra Pratap Swain could have requested the Returning Officer to search for the original Form A and Form B or he would have rebutted the objection by adducing evidence. As no time was granted he was highly prejudiced.

In the decision Rakesh Kumar (supra), the apex court held as follows:-

“Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time “not later than the next day”. This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso to Section 36 (5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play”.

17. In the decision Mrs. Maneka Gandhi (supra) the question was whether passport of a person

can be impounded without giving him/her an opportunity of being heard. There is no express provision in the Passports Act, 1967, which requires that the audi alteram partem Rule should be followed before impounding a passport. But, still then, the apex Court held that before impounding the passport, the person concerned must be given a chance of being heard. In the case of Jagannath Ramchandra Nunekar (*supra*) a candidate seeking election from a constituency, other than one, in which he was registered as a voter, applied to the Electoral Registration Officer of the Assembly Constituency, in which, he was registered as a voter, for a certified copy of the relevant entry in the electoral roll containing his name for producing it before the Returning Officer along with his nomination paper in respect of Assembly election of the State of Maharashtra to be held in 1986. The Registration Officer gave him a certificate on the basis of the electoral roll of the year 1984. The Returning Officer did not accept it as it was not the certified copy from the latest electoral Roll. So the candidate (appellant) again applied for a certified copy of the relevant entry from the latest electoral roll published. The certified copy was granted at 5.00 P.M. dated 10.1.1986, i.e., the last date fixed for filing Nomination. He produced it before the Returning Officer on the next date, i.e., the date fixed for scrutiny of the Nomination Papers. But the Returning Officer stated that he had already rejected his Nomination. The apex Court held that the order of rejection of the Nomination Paper of the candidate was illegal. In the decision State Bank of Patiala and others (*supra*) cited on behalf of the respondent, it was alleged by the respondent, an employee of State Bank of Patiala, that he was prejudiced in a departmental proceeding, since he was not supplied with copies of statements of witnesses and documents, as required under the Regulation, 1968. Even though, the Regulation mandates that the delinquent shall be supplied with copies of statement of witnesses, if any, recorded earlier, not later than three days before commencement of examination of witnesses by the Enquiring authority, in fact, this provision was not complied with in strict sense. But the delinquent was allowed to go through the statement of witnesses and other documents. By the time the witnesses were examined, more than three days had been already expired, since the date on which the delinquent went through the statement of the witnesses and other documents. So, the apex Court held that even though there was violation of the Regulation, still then, as no prejudice was caused to the delinquent, he could not take advantage of mere violation of the Regulation. In the case of Aligarh Muslim University and others (*supra*), the apex Court held that even though opportunity was not given to the respondent to show cause, still then, since no other conclusion was possible on indisputable facts, his removal from service was found to be correct.

18. In the case at hand, it is the constant stand of the election petitioners that Sri Ranendra Pratap Swain filed the original ink signed Form A Form B in the 1st set of Nomination papers. Admittedly, Nomination papers of all the contesting candidates of 89-Athagarh Assembly Constituency were xeroxed

outside. So, in the process, the original ink signed Form A and Form B might have been misplaced and had the election petitioner, Ranendra Pratap Swain got an opportunity, he could have requested the Returning Officer to

search for those documents or he could have adduced evidence to show that in fact he had filed the same. Since no such opportunity was given, he was thereby prejudiced. The decisions cited on behalf of the respondent would not be applicable to the present case.

19. Learned counsel for the respondent further submitted that as per the proviso to Section 36(5) of the Representation of People Act, the Returning Officer may or may not allow time to rebut any objection. In other words, he is not bound to grant time. In support of his submission he relied on the decisions **A.N.Sehgal –vs- Raje Ram Sheoram**, AIR 1991 SC 1406, **Tribhorandas Haribhai Tamboli –vs- Gujrat Revenue Tribunal and others**, AIR 1991 SC 1538, **S.Sundaram Pillai –vs- V.R.Pattabhiraman**, AIR 1985 SC 582.

In the case at hand, none of the candidates or their representatives challenged the validity of the Nomination Papers of Sri Ranendra Pratap Swain. Suo motu objection was raised by the Returning Officer himself only. P.W.3 filed an application to grant time to rebut the objection. As per the decision, in the case of Rakesh Kumar, the Returning Officer ought have granted time to rebut the

objection, even in absence of any application to that effect. So, the decisions cited on behalf of the respondent are not applicable to the present case. I have already held that Sri Ranendra Pratap Swain had filed the original Form-A and Form-B duly signed in ink by the authorized person. Again, he was highly prejudiced as he was not given time to rebut the objection. So, it is held that the Returning Officer improperly rejected the nomination of Sri Ranendra Pratap Swain and accordingly issue Nos.3 and 5 are answered in affirmative.

20. Issue No.2. Section 82 of the Representation of the People Act, 1951 which deals with the parties to an election petition reads as follows:

"82. Parties of the petition- A petitioner shall join as respondents to his petition-
(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 82 Clause (a) as quoted above requires the election petitioner to join as respondents in his petition, all the contesting candidates, where in addition to claiming a declaration that the election of all or any of the returned candidates is void, he claims further declaration that he himself or any other candidate has been duly elected. But in absence of such further prayer, he had to join the returned candidate/candidates only. In the present case, the election petitioners do not claim a declaration that Sri Ranendra Pratap Swain or any body else has been duly elected. So, the election petitioners have rightly impleaded the returned candidate alone as respondent. Accordingly, the issue is answered in favour of the election petitioner.

21. Issue Nos.1 and 4 In view of the discussion made above, the election petitions are maintainable.

In the result, both the election petitions are allowed. It is declared that the election of respondent No.1 is null and void and that a casual vacancy is created relating to 89-Athagarh Assembly Constitution thereby. The appropriate authorities are directed to conduct fresh election in respect of the said Constituency in accordance with law. No cost.

Sd/- R.N. Biswal. J

Orissa High Court, Cuttack
The 23rd June, 2010

List of witnesses examined on behalf of the petitioner

P.W.1 – Rabindra Rout
P.W.2 – Ranendra Pratap Swain
P.W.3 – Taranikanta Biswal

List of witnesses examined on behalf of the respondent

O.P.W.1 – Ramesh Rout
O.P.W.2 – Maguni Charan Rout
O.P.W.3 – Dibakar Sahoo
O.P.W.4 – Rabindra Kumar Jena

Court Witness

Sri Rajesh Pravakar Patil

List of Exhibits filed on behalf of the petitioner

Exhibit-1 Election photo identity card of Sri Rabindranath Rout

Exhibit-2 Certified copy of the application filed by P.W.1 Rabindranatah Rout dated 02.04.2009 before the Returning Officer 89-Athagarh Assembly Constituency-cum-Sub Collector, Athagarh Sub- Division for supply of nomination papers for the General Assembly Election-2009 together with acknowledgement receipt.

Exhibit-3 Certified copy of the receipt bearing No.775152 dated 02.04.2009 showing security deposit of Rs.5000/-.

Exhibit-4 Certified copies of first set of Nomination paper duly filled in and signed by the proposer Rabindranath Rout as well as the Election Petitioner Ranendra Pratap Swain together with accompanying documents.

Exhibit-5 Certified copies of second set of Nomination paper duly filled in and signed by the proposer as well as the election petitioner- Ranendra Pratap Swain together with accompanying documents.

Exhibit-6 Certified copies of third set of Nomination paper duly filled in and signed by the proposer as well as the election petitioner together with accompanying documents.

Exhibit-7 Certified copies of fourth set of Nomination papers duly filled in and signed by the proposer as well as the election petitioner together with accompanying documents.

Exhibit-8 Original "certificate for receipt of oath" in prescribed form.

Exhibit-9 Original "certificate for receipt of Nomination paper and notice of scrutiny" granted by Returning Officer from Part-VI of the Nomination form.

Exhibit-10 Copy of the circular number 57613/2009/SDR dated 10.2.2009 issued by the Election Commission of India.

Exhibit-11 Original "Check List" granted by the Returning Officer of 89-Athagarh Constituency on 4.4.2009 showing receipt of documents.

Exhibit-12 Certified copies of Form 3A relating to "Notice of Nominations" in respect of 87-Baramba Assembly Constituency from dated 28.3.2009 to 4.4.2009.

Exhibit-13 Certified copies of Form 3A relating to "Notice of Nomination" in respect of 89-Athagarh Assembly Constituency from dated 28.3.2009 to 4.4.2009.

Exhibit-14 Certified copy of the forwarding letter sent by the Returning Officer to the Chief Electoral Officer, Orissa with copy to District Election Officer, Cuttack and to the Director of Printing, Stationary and Publication, Orissa, Cuttack-10 in respect of Consolidated "List of nominated candidates-Checks if" for 87-Baramba Assembly Constituency.

Exhibit-15 Certified copy of forwarding letter sent by the Returning Officer to the Chief Electoral Officer, Orissa with copy to the District Election Officer, Cuttack and to the Director of Printing, Stationary and Publication, Orissa, Cuttack-10 in respect of Consolidated "List of Nominated candidates-Check if" together with the certified copies of the Consolidated "List of Nominated candidates-Check if" for 89-Athagarh Assembly Constituency.

Exhibit-16 Certified copy of the authorization letter of the Election petitioner, Sri Ranendra Pratap Swain in favour of Sri Tarani Kanta Biswal to attend the scrutiny of his behalf.

Exhibit 17 Certified copy of the "Time petition to rebut the objection" filed by Sri Tarani Kanta Biswal, Authorized Agent of the election petitioner, before the Returning officer and the order passed by the Returning Officer in the body of the same time petition.

Exhibit-18 First set of Nomination papers filed by the election petitioner before the Returning officer.

Exhibit- 19 Second set of Nomination papers filed by the Election petitioner before the R.O.

Exhibit-20 Third set of Nomination papers filed by the petitioner before the R.O.
Exhibit-21 Fourth set of Nomination papers filed by the petitioner before the R.O.
Exhibit-22 Check List prepared by the Returning officer in the presence of petitioner.
Exhibit-23 Form 'A' filed by Sri Surendra Kumar Nanda
Exhibit-24 Form 'B' filed by Sri Surendra Kumar Nanda
Exhibit-25 Check list of Sri Surendra Kumar Nanda
Exhibit-26 Form 'A' filed by Sri Debi Prasad Mishra
Exhibit-27 Form "B" filed by Sri Debi Prasad Mishra
Exhibit-28 Check list of Sri Debi Prasad Mishra
Exhibit-29 Form 'A' filed by Sri Bhaskar Dalei
Exhibit-30 Form 'B' filed by Sri Bhaskar Dalei
Exhibit-31 Check List of Sri Bhaskar Dalei
Exhibit-32 Form 'A' filed by Sri Saroj Kumar Rana
Exhibit-33 Form 'B' filed by Sri Saroj Kumar Rana
Exhibit-34 Check List of Sri Saroj Kumar Rana
Exhibit-35 Form 'A' filed by Sri Subash Mohanty
Exhibit-36 Form 'B' filed by Sri Subash Mohanty
Exhibit-37 Check List of Sri Subash Mohanty
Exhibit-38 Form 'A' filed by Sri Rama Narayan Mohanty
Exhibit-39 Form 'B' filed by Sri Rama Narayan Mohanty
Exhibit-40 Check list of Sri Rama Narayan Mohanty
Exhibit-41 Form 3A dated 29.3.2009 of 87-Baramba
Exhibit-41/a Form 3A dated 29.3.2009 of 87-Baramba
Exhibit-41/b Form 3A dated 30.3.2009 of 87-Baramba
Exhibit-41/c Form 3A dated 31.3.2009 of 87-Baramba
Exhibit-41/d Form 3A dated 02.04.2009 of 87-Baramba
Exhibit-41/e Form 3A dated 03.04.2009 of 87-Baramba
Exhibit-41/f Form 3A dated 04.04.2009 of 87-Baramba
Exhibit-42 Form 3A dated 28.03.2009 of 89-Athagarh
Exhibit-42/a Form 3A dated 29.03.2009 of 89-Athagarh
Exhibit-42/b Form 3A dated 30.03.2009 of 89-Athagarh
Exhibit-42/c Form 3A dated 31.03.2009 of 89-Athagarh
Exhibit-42/d Form 3A dated 02.04.2009 of 89-Athagarh
Exhibit-42/e Form 3A dated 03.04.2009 of 89-Athagarh
Exhibit-42/f Form 3A dated 04.04.2009 of 89-Athagarh
Exhibit-43 Letter of Sub-Collector Athagarh to the Chief Electoral Officer,
Orissa

Exhibit-43/a List of nominated candidates of 87, Baramba

Exhibit-44 List of nominated candidates of 89-Athagarh

Exhibit-45 xerox copies of Form 2-B

Exhibit-46 Authorization letter of Sri Ranendra Pratap Swain

Exhibit-47 Time petition of Sri Tarani Kanta Biswal

Exhibit-48 Certified copy of order rejecting the nomination paper of the
petitioner, Ranendra Pratap Swain

Exhibit-48/a Certified copy of order rejecting the nomination paper of the
petitioner, Ranendra Pratap Swain

Exhibit-48/b Certified copy of order rejecting the nomination paper of the
petitioner, Ranendra Pratap Swain

Exhibit-48/c Certified copy of order rejecting the nomination paper of the
petitioner, Ranendra Pratap Swain

Exhibit-49 Appeal Petition of the petitioner to the Hon'ble C.E.O. in original

Exhibit-50 Appeal Petition of the petitioner to the Hon'ble C.E.O. in original

Exhibit-51 Authorization to attend scrutiny of nomination filed by
Respondent-1

Exhibit-52 Certified copy of letter No.1548 dated 6.3.2009 of Sub-
Collector, Athagarh.

Exhibit-53 Check List in original of Sri Anukul Chandra Sahoo

Exhibit-54 Check List in original of Sri Bijay Kumar Biswal

Exhibit-55 Check List in duplicate of Janaki Rout

Exhibit-56 Money receipt showing payment to Anand Xerox

Exhibit-57 Requisition letter (Xerox copy obtained under the R.T.I. Act)

List of M.Os

M.O.I - Videograph

M.O.II- Videograph

Sd/- R.N. Biswal. J

By order,

(R.K. SRIVASTAVA)
PRINCIPAL SECRETARY
ELECTION COMMISSION OF INDIA